United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appelle

-vs-

ANTONIO FLORES,

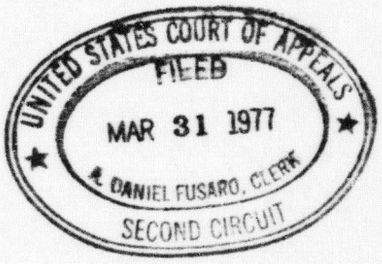
Defendant-Appellant

----------x

BP/S

REPLY BRIEF

Appeal From A. Judgment of Conviction
In the United States District Court
For the Southern District of New York



STUART R. SHAW
ATTORNEY AT LAW
600 MADISON AVENUE
NEW YORK, N. Y. 10022

(212) 755-5645

Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF CASES

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-vs-

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REPLY BRIEF ON BEHALF OF
DEFENDANT ANTONIO FLORES

Preliminary Statement

This brief is submitted on behalf of defendant, Antonio Flores, in reply to specific arguments raised in the Government's brief. Failure to reply to any particular matter in the Government's brief means that Flores' main brief sufficiently addressed the question or that the particular matter is insignificant with respect to the disposition of this case.

POINT ONE

THE PROSECUTION'S BRIEF HAS CONTINUED TO MISLEAD THIS HONORABLE COURT AND MAKES UNJUSTIFIED ACCUSATIONS AGAINST FELLOW ATTORNEYS

The prosecutor continues to contend that the letters from the Spanish Embassy were mere unofficial letters prompted by FLORES' family. (prosecution's brief, page 18, footnote). This Honorable Court is respectfully referred to a letter, dated February 17, 1977, signed by Francisco J. Viqueira, deputy consul of the Embassy of Spain, which states unequivocally that the Spanish Government has sent two formal letters of protest to the United States Department of State (please see defendant's appendix to main brief, page A69).

The prosecution has misrepresented to this Honorable Court the significance of the formal letter of protest, dated September 29, 1976, by referring to it as "a post-trial diplomatic note" (prosecution's brief, page 18).

The prosecution accuses defense counsel of making "conclusory and implausible statements" regarding the fact that the Spanish Embassy reviewed the trial transcript prior to sending the September 29, 1976 letter of protest (see Government Brief, page 20). Members of the defendant FLORES' family have been in contact with the officials of the Spanish Embassy. Members of the FLORES' family have informed defense counsel that a copy of the trial transcript was supplied to the Spanish Embassy. The

prosecution's attempts to minimize the significance of the formal letter of protest should be ignored considering all of the aforementioned facts.

The prosecution's brief contains mischaracterizations without support in the record. Canadian customs officials are described as "autograph hungry". Careful perusal of the transcript pages cited by the prosecution in support of this alleged description reveals that the term "autograph hungry" was invented by the prosecution in the same manner as the "French Connection" was invented.

During summation, the prosecutor contended that Jerry Feldman, Howard Diller and other corrupt attorneys were involved in this alleged conspiracy. The prosecutor now states that these outrageous accusations were simple discussions of evidence adduced at trial. (please see Government Brief pages 29-33).

The so called evidence relied on by the prosecutor came from the mouth of Terry Paul Jones, a convicted strong arm robber (TT-426, 427) and said government informant (TT-428) who was offered five thousand ($5,000) dollars by the prosecution to cooperate with the Government against FLORES (TT-473). Jones gave absolutely no testimony about any activities between September 3, 1970 and April 30, 1971.

The testimony of Terry Paul Jones was admissible for a limited purpose only. United States v. Flores, 538, F2d 939 (2nd Cir., 1976). However, the prosecutor used Jones' testimony

to denounce the character of Mr. Diller, Mr. Feldman and "other attorneys". It is interesting to note that neither Diller nor Feldman have ever been indicted for any activities based on the prosecutor's accusations. On information and belief, the same two attorneys were subpoenaed to testify before a grand jury convened by the same prosecutor, but the grand jury was adjourned indefinitely, which is typical of this prosecutor's typical fashion of baseless bombast.

It is respectfully submitted that the prosecutor's unsubstantiated accusations against "other attorneys" inflamed the jury and allowed the jury to speculate as to who such "other attorneys" might have been. Defense counsel respectfully reminds this Honorable Court that he was appointed to represent the defendant at trial and, at best, was not involved with any aspects of this case prior to March, 1976.

The prosecutor further inflamed the jury by repeatedly referring to the instant case as the "French Connection" (TT-21, 25, 28, 31, 1118, 1120) involving huge amounts of cash (TT-21, 28, 1120, 1122, 1125) and kilos of heroin (TT-24, 25, 26, 27, 29, 33, 1125, 1126, 1128, 1136, 1171).

In this case, the "French Connection" was as elusive as the large quantities of heroin and money which were never introduced into evidence.

The prosecutor claimed that the bulk of the alleged money and heroin came from Corsicans.

One can only wonder why the prosecutor did not emphasize the term "Corsican Connection" during the trial. Could it be because no successful movie was made by that name?

POINT TWO

PREJUDICAL ERROR WAS FURTHER ACCUMULATED WHEN THE TRIAL JUDGE INSTRUCTED A JUROR IN CHAMBERS THAT DEFENDANT MAY HAVE BEEN SHACKLED IN HANDCUFFS

The accumulation of errors in the trial below (please see defendant's main brief, pages 47-49) were further exacerbated when it was discovered that defendant FLORES suspected that two jurors saw him wearing handcuffs during a luncheon recess (TT-206). The Honorable District Court Judge decided to interview the two jurors alone (TT-237-238). The colloquy between the Trial Judge and juror number 7 was reflected in the record as follows:

> "THE COURT: Hello Mrs. Lubic. Won't you sit down, please?
>
> Mrs. Lubic, it has been reported to me that after we broke for lunch today that you may have seen the defendant, Mr. Flores, in the hall. Do you remember seeing him?
>
> JUROR NO. 7: I had gone to the phone booth and as I came out of the phone booth to the elevator he went past.
>
> THE COURT: You saw the defendant?
>
> JUROR NO. 7: Yes.
>
> THE COURT: All right. I take it you observed the defendant was in handcuffs?

JUROR NO. 7: No.

THE COURT: You did not observe that?

JUROR NO. 7: No.

THE COURT: All right. The point is that the rumor has it that you may have seen him and that he might have been in handcuffs. But you didn't observe that?

JUROR NO. 7: No, I did not observe that.

THE COURT: Because you remember I told you yesterday that the defendant is presumed to be innocent until he is found guilty beyond a reasonable doubt, and whether you might have observed that or not has absolutely no bearing on the case. So that experience would not affect you in any way, would it?

JUROR NO. 7: No, sir.

THE COURT: I wouldn't think so. All right. That is all I wanted to ask you,and don't tell your fellow jurors about the incident, particularly don't mention anything about handcuffs.

JUROR NO. 7: Okay.

THE COURT: All right?

JUROR NO. 7: Yes.

THE COURT: Thank you ever so much for coming. I appreciate it.

JUROR NO. 7: Should I not use that phone again down the hall?

THE COURT: No, no, indeed, that phone is there for you to use if it is available. Sure. Not a bit. Thank you."

(TT-239-241)

Defense counsel objected to the manner in which the Trial Judge instructed juror number 7 (TT-242). It did not matter whether or not the juror saw the defendant in handcuffs. The leading questions of the Trial Judge implanted a severely prejudicial image of the defendant in the mind of juror number 7.

The First Circuit has stated that the most effective way to deal with this type of situation is to ask a blind question of all the jurors, to be answered by a show of hands whether any juror had seen the defendant prior to their appearance in the courtroom. Such jurors could then be excused without explanation. O'Shea v. United States, 400 F 2d 78, 80 (1st Cir., 1968); cert. den, 89 S Ct. 726 (1969); see also United States v. Larkin, 417 F 2d 617 (1st Cir., 1969); Kennedy v. Cardwell, 487 F 2d 101 (6th Cir., 1973), cert. den., 416 U.S. 959 (1974).

It is respectfully submitted that a blind question would have avoided the possibility of infecting the mind of juror number 7 with prejudice against the defendant. Defendant submits that the Trial Judge caused prejudice in the mind of juror number

7 by asking leading questions and using the word handcuffs on three occasions.

The brief for the prosecution makes no response to defendant's contention that the cumulative effect of all the trial errors requires a reversal of the conviction. It is respectfully submitted that the errors established in defendant's main brief plus the contentions herein must lead to a reversal of defendant's conviction.

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE JUDGEMENT OF CONVICTION AGAINST DEFENDANT FLORES SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED, OR IN THE ALTERNATE AND SHOULD BE A REMAND FOR A NEW TRIAL.

Dated: New York, New York
March 31, 1977

Respectfully submitted,

STUART R. SHAW

Attorney for defendant
Antonio Flores

600 Madison Avenue
New York, New York 10022